

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

DANIEL A. BERNATH, an individual, and
as assignee of OREGON TRAIL TRUST,

Plaintiff,

v.

FLIGHT DESIGN USA, et al.,

Defendants.

Case No. 3:13-cv-01778-SI

ORDER

Michael H. Simon, District Judge.

Plaintiff filed his complaint in this case on October 7, 2013. Dkt. 1. Defendants filed a motion for summary judgment on April 21, 2014. Plaintiff's response to the motion for summary judgment was due on May 15, 2014. Plaintiff did not file a response to the motion for summary judgment and, instead, on May 25, 2014, Plaintiff filed a motion to dismiss his complaint without prejudice. Dkt. 10. Defendants respond that because the motion to dismiss without prejudice was filed after Defendants had filed their motion for summary judgment, any dismissal must be with prejudice and must be pursuant to Federal Rule of Civil Procedure 41(b). Dkt. 11.

A plaintiff may voluntarily dismiss his or her complaint without a court order by a notice of dismissal before the opposing party serves either an answer or a motion for summary

judgment or by filing a stipulated dismissal. Fed. R. Civ. P. 41(a)(1)(A). Because Defendants have filed a motion for summary judgment in this case, Plaintiff may not voluntarily dismiss his complaint without a court order unless Defendants stipulate to the dismissal. Plaintiff, may, however, move for dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2). A dismissal under this rule is “on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2).

A court must liberally construe the filings of a *pro se* plaintiff and afford the plaintiff the benefit of any reasonable doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Accordingly, the Court interprets Plaintiff’s motion to dismiss as one brought under Rule 41(a)(2). Plaintiff requests the dismissal be without prejudice so that he can join in a class action that Plaintiff believes is being prepared for filing against Defendants, or can refile his individual complaint.

Considering the record in this case, Defendants’ pending motion for summary judgment, and Plaintiff’s motion to dismiss his complaint, the Court GRANTS Plaintiff’s motion (Dkt. 10) on the following terms: the dismissal is WITH PREJUDICE with respect to Plaintiff refiling his individual action or acting as a class representative and the dismissal is WITHOUT PREJUDICE with respect to Plaintiff joining a class action as a class member. Defendants’ motion for summary judgment (Dkt. 7) is DENIED AS MOOT.

IT IS SO ORDERED.

DATED this 28th of May, 2014.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge